02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, ET AL.,

Petitioners,

—v.—

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, PEOPLE FOR THE AMERICAN WAY FOUNDATION AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan, membership organization dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Washington is one of its statewide affiliates.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state.

People for the American Way Foundation is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. It was founded by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty.

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work.

Each of the *amici* has appeared before this Court on numerous occasions. Each is committed to the principle of separation between church and state, and to enforcing that

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[1] Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

principle by respecting the values of both the Free Exercise Clause and the Establishment Clause. Each of the *amici* also supports the proposition that the government may not engage in viewpoint discrimination under the First Amendment. Because all of these doctrines have been raised in this case, its proper resolution is a matter of significant concern to the *amici*, their members and their constituents.

For reasons explained in more detail below, *amici* are persuaded that Washington does not engage in viewpoint discrimination or violate the Free Exercise Clause when it declines to use state tax dollars to subsidize clergy training. *Amici* therefore urge the Court to reverse the contrary decision of the Ninth Circuit.

STATEMENT OF THE CASE

This case asks whether Washington violated the Free Exercise Clause of the First Amendment when it followed a state law forbidding the use of public funds for theology degrees, as applied to an applicant studying to become a Protestant minister. In *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*), this Court held that the federal Establishment Clause does not prohibit a recipient's use of government funds for clergy training as part of an otherwise neutral scholarship program. *Witters II* left open the question posed here: whether the Free Exercise Clause demands that clergy training be included within government scholarship programs notwithstanding a clearly-expressed legislative judgment to restrict funding to secular education. *Id.* at 489-90.

Like many states, Washington includes more specific language in its state constitution regarding religious freedom than is found in the Religion Clauses of the First

Amendment. Instead of providing that the state "shall make no law respecting an establishment of religion, or prohibiting free exercise thereof," U.S. Const. amend. I, Washington's constitution provides in relevant part:

> RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and *no one shall be molested or disturbed in person or property on account of religion*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. *No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.* . . . No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Wash. Const. art. I, § 11 (emphasis added). To ensure that no one will be "molested or disturbed in . . . property" on account of religion, the law governing state-funded college-level financial aid requires that scholarships be awarded "without regard to the applicant's … religion." WASH. REV. CODE § 28B.10.812. To ensure that no public money is appropriated or applied for "religious worship, exercise or instruction," state law mandates that "[n]o aid shall be

awarded to any student who is pursuing a degree in theology." WASH. REV. CODE § 28B.10.814.

Beginning in 1999, the legislature appropriated general funds for the Washington Promise Scholarship. The scholarships subsidize tuition during the first two years of enrollment in accredited institutions of higher education in Washington state, and are available to students from Washington whose family income falls below a specified level, who graduated in the top fifteen percent of their high school class, who are enrolled at least half-time, and who are not pursuing a degree in theology. Recipients may use the scholarship to attend any eligible college or university – even those that are religiously affiliated – so long as the course of study is not a degree in theology.

The statute does not define "theology." However, it is generally understood that this term is intended to reflect the judicial interpretation of the words "religious instruction" found in Wash. Const. art. I, § 11: namely, "instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce faith and belief in the student." *Calvary Bible Presbyterian Church v. Bd. of Regents of the Univ. of Wash.*, 436 P.2d 189, 193 (Wash. 1967). Thus, while "theology" encompasses training to become a religious minister, it does not include a course of study in which one learns about one or more religions, such as that pursued in obtaining a comparative religion or religious studies degree. It is with these guidelines in mind that colleges and universities ascertain which of their degree programs constitute training in "theology" under the statute.

Plaintiff Joshua Davey is a Washingtonian who attended Northwest College, an accredited four-year college affiliated with the Assemblies of God (Pentecostal)

denomination of Protestant Christianity. Davey met the financial and high school academic requirements for a Promise Scholarship, but he was not eligible to receive the funds because, as determined by Northwest College, his major in "Pastoral Ministries" was a degree in theology within the meaning of WASH. REV. CODE 28B.10.814. Davey does not dispute that he was pursuing a degree in theology: the Pastoral Ministries major at Northwest College trains students for careers as clergy in Assemblies of God churches. To earn a degree, students must take courses that include, among other things, "Pentecostal (A/G) Doctrines," "Systematic Theology," and "Worship Planning and Design." ER Tab 12 at 23.

Davey filed suit in the Western District of Washington, asserting that failure to provide a state scholarship for his clergy training violated various constitutional rights. The trial court awarded summary judgment to the state defendants on all claims, but in a split decision the Ninth Circuit reversed, holding that Washington had violated Davey's right to free exercise of religion. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

By holding that Washington state must either abandon its scholarship program or make it available on an equal basis to students who wish to use public funds for clergy training, the Ninth Circuit proceeded on the assumption that, at least in this context, any state expenditure that is permitted by the Establishment Clause is constitutionally required by the Free Exercise Clause. This Court has never endorsed that view. Instead, the Court has held that so long as they do not violate either the Free

Exercise Clause or the Establishment Clause, states are entitled to exercise their own best judgment on how to structure the complex relationship between government and religion.

This Court has acknowledged that there is, inevitably, some "play in the joints" between the Religion Clauses. *Walz v. Tax Comm. of New York*, 397 U.S. 664, 669 (1970). "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* Thus, for example, states may provide public bus service to parochial school students without offending the Establishment Clause, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), but they are not required to do so by the Free Exercise Clause. *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974). Similarly, states can choose to include parochial schools within a public voucher program, assuming the appropriate safeguards, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), or they can choose not to. *Brusca v. Mo ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *summarily aff'd*, 405 U.S. 1050 (1972).

For several reasons, the challenged scholarship program in this case fits comfortably within the permissible range of policy choices available to Washington under this Court's decisions. First, public funding for the clergy was a centerpiece of the debates leading to the enactment of the Religion Clauses. Given the nature of that debate, the framers did not likely intend the Free Exercise Clause to be a source of mandatory funding for clergy training. To the best of our knowledge, the Ninth Circuit is the only federal court to have adopted that theory.

Second, Washington has decided that allowing its state scholarships to be applied to clergy training will do more to undermine religious neutrality than to promote it. The Promise Scholarship Program is only available to eligible students who attend accredited institutions in the State of Washington. In practice, that includes very few clergy training programs because most religions train their clergy outside academic settings altogether, in other states, at the graduate level, or – as was the case with Mr. Witters – at non-accredited institutions. The federal Constitution should not be read to prohibit Washington from structuring its Promise Scholarship to avoid the anomalous result of funding clergy training for Mr. Davey, but not for Mr. Witters and his many counterparts in other religions.

Third, even the Ninth Circuit acknowledged that the Promise Scholarship Program developed by Washington is consistent with the standards that this Court has employed to measure a Free Exercise violation. It does not compel respondent to do anything that his religion prohibits or prohibit anything that his religion compels. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). Nor does it place respondent in the position of relinquishing one constitutional right in order to exercise another. *McDaniel v. Paty,* 435 U.S. 618 (1978). By contrast, where a law simply makes the practice of some religious beliefs more expensive than they would be under a different law, the Court has found no Free Exercise violation. *E.g., Braunfeld v. Brown*, 366 U.S. 599 (1961).

Finally, the decision below rested on a misapplication of this Court's viewpoint discrimination jurisprudence. Clergy training is different in kind, not simply in viewpoint, from the secular fields of study subsidized by the Promise Scholarship. Different religions will offer varying viewpoints about the nature of God, but these viewpoints

taken together form the subject matter of theology. Accordingly, this Court has long recognized that the study of comparative religion is different in kind from the study of theology at issue here. Moreover, this Court's recent public forum decisions in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), do not indicate otherwise.

The purpose of the viewpoint-neutrality doctrine is to prevent government actions based on hostility to a particular idea, and to assure that government does not skew public debate so as to further its own desired outcome. Washington has not skewed religious discourse by declining to subsidize Davey's clergy training. A state's decision to provide for greater separation of church and state than the federal Establishment Clause, like the decision to provide greater protection for religious activity than the federal Free Exercise Clause, does not convey hostility to religion. While *amici* fully agree with this Court's frequently-stated rule that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," *Rosenberger*, 515 U.S. at 830, there is no such viewpoint discrimination on these facts.

ARGUMENT

I. The Federal Free Exercise Clause and Establishment Clause Leave "Room for Play in the Joints" Allowing States Some Discretion to Select Varying Methods to Guarantee Religious Liberty

Washington excludes theology degrees from its state-funded college scholarships in order to adhere to its state Establishment Clause, even though the federal Establishment Clause as interpreted by *Witters II*, does not require such an exclusion. As the Washington Supreme Court explained: "our state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989) (*Witters III*). If the Free Exercise Clause requires the state to fund all collegiate religious instruction not barred by the Establishment Clause, *Witters II* would resolve the present case. But the federal constitution is not so rigid: it contemplates a range of constitutionally acceptable relationships between church and state. The range is not infinite, but it is broad enough to encompass Washington's approach.

This Court has rejected a strict duality where the Free Exercise Clause would require everything permitted by the Establishment Clause and the Establishment Clause would forbid everything not required by the Free Exercise Clause.

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general

> principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz, 397 U.S. at 669 (emphasis added). *Accord*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). The Religion Clauses do not fit as tightly as the interlocking pieces of a jigsaw puzzle, and should not become "the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

The play in the joints identified in *Walz* has allowed this Court to uphold contrasting policy choices relating to state spending for education. For example, *Everson*, 330 U.S. 1, held that the Establishment Clause allowed a state to provide school bus service for children attending private parochial schools. But *Luetkemeyer*, 364 F. Supp. 376, held that a state following the religion clauses of its own constitution could choose not to provide that same service.

> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise

> Clause in which action by a State will not violate the former nor inaction, the latter. For example, *Walz v. Tax Commission*, 397 U.S. 664 (1970), concluded that a State may or may not tax church property. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." 397 U.S. at 673. Likewise, *Tilton v. Richardson*, 403 U.S. 672 (1972), established that a State may or may not grant funds to church-related schools for construction of buildings for secular use.

364 F. Supp. at 386. Like Missouri in *Luetkemeyer*, Washington has chosen as a matter of state constitutional law not to provide the bus service to parochial schools allowed under *Everson*. *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949). Other states have made the same choice. *E.g.*, *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (state and federal constitutions would allow public bus transportation to parochial schools, but legislature had not authorized it).

The same pattern appears in the context of state-funded teachers, tutors, or educational assistants working on the grounds of private parochial schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), held that the Establishment Clause did not prohibit Arizona from providing a deaf parochial school student with a state-funded sign language interpreter as part of a religiously-neutral program, and *Agostini v. Felton*, 521 U. S. 203 (1997), held that the Establishment Clause did not prohibit New York from sending special education teachers, among others, to perform secular duties on the grounds of parochial schools.

But, as the Fourth Circuit properly recognized, the Establishment Clause holding in *Zobrest* did not require North Carolina to provide sign-language interpreters to private religious schools; "[w]hile the Establishment Clause determines whether the County may provide certain services in sectarian schools, it does not mandate that the County provide such services." *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995). A Wisconsin court reached the same conclusion, explaining that while *Zobrest* "held that the public provision of a sign-language interpreter for use in a private sectarian school did not violate the Establishment Clause," this "does not mean that the Constitution requires such provision." *Nieuwenhuis v. Delavan-Drien Sch. Dist.*, 996 F. Supp. 855, 864 (E.D. Wis. 1998). The Eighth Circuit ruled likewise, holding that Missouri had no obligation to send state-funded special education teachers to parochial schools, even after the court's decision in *Agostini*. "Missouri's refusal to allow public school educators on private school premises may not be mandated by the First Amendment [under *Agostini*] . . . [b]ut we find nothing in the [IDEA] authorizing federal courts to override such a state policy." *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998).

A similar collection of cases illustrates the government's ability to create or not create voucher programs that subsidize tuition at private religious schools. *Zelman* 536 U.S. 639, held that the Establishment Clause did not bar a Cleveland program that paid tuition at a variety of public and private schools, including parochial schools. But *Brusca*, 332 F.Supp. at 279, held that the Free Exercise Clause did not require a state to subsidize attendance at parochial schools.

> All that is here involved is whether the enactment of some program designed to assist a parent in educating his child religiously with the use of tax-raised money is *mandated* by the First Amendment. On this narrow issue we hold that to the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State.

Id. at 279 (original emphasis). As this Court noted in another context, a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

Washington has chosen in the tuition context not to make primary and secondary school voucher payments that might be allowed under the federal Establishment Clause. *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973) (state constitution does not permit voucher programs that extend to parochial schools); *Gallwey v. Grimm*, 48 P.3d 274, 279-89 (Wash. 2002) (reaffirming *Weiss* rule as applied to K-12 schools). Other states have made the same policy choice, which has been routinely upheld by state and federal courts. *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (upholding against Free Exercise challenge a state law that reimburses tuition for certain public and private schools but excludes parochial schools); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 133-35 (Me. 1999) (same); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563 (Vt. 1999) (no Free Exercise violation when Vermont constitutional prohibition on "compelled support" for religion prevents public school districts from reimbursing tuition for parochial schools); *Jackson v. California*, 460 F.2d 282, 283 (9th Cir. 1972) (per curiam) (relying on *Brusca* to hold that Free Exercise Clause does not require California to create a tuition grant program applicable to parochial schools). These cases demonstrate how "a State could rationally conclude as a matter of

legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance." *Norwood*, 413 U.S. at 462.

This Court's handling of *Witters II* is fully consistent with the "play in the joints" principle. Like the current case, *Witters II* involved Washington's choice not to fund clergy training. The Washington Supreme Court initially held that the exclusion was required by the Establishment Clause and did not violate the Free Exercise Clause. *Witters v. Comm'n for the Blind*, 689 P.2d 53 (Wash. 1984) (*Witters I*). This Court reversed the Establishment Clause decision. *Witters II*, 474 U.S. 481. The Court then remanded, making no ruling on the Free Exercise question briefed by the parties and ruled on below. The Court noted that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (citation omitted). The Washington Supreme Court then held that application of scholarship funds for clergy training would violate Wash. Const. art. I, § 11 and withholding the funds would not violate federal Free Exercise or Equal Protection guarantees. *Witters III*, 771 P.2d 1119. This Court denied the plaintiff's subsequent petition for *certiorari*. 493 U.S. 850 (1989). Now that the question has arisen again, this Court should once again acknowledge the freedom of the states to make different policy choices than the federal government.

II. Washington's Choice Not to Apply Tax Money to Clergy Training Falls Within the Realm of Acceptable Relationships Between Church and State

The Court need not in this case attempt to delineate the precise contours of the zone between the Free Exercise and Establishment Clauses. The narrow question posed by this as-applied challenge is whether Washington's decision

not to provide a tax-supported scholarship for clergy training falls within that zone. *Amici* believe the answer is yes.

A. The Founders Did Not Intend for the Free Exercise Clause to Mandate Government-Funded Clergy Training

When evaluating the interaction of the religion clauses, *Walz* considered it significant (but not dispositive) that property tax exemptions for churches had a lengthy history in many American jurisdictions. "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . [pursued] openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." 397 U.S. at 678. Washington's decision not to fund clergy training has similarly deep historical roots.

Wash. Const. art. I, § 11 reflects Virginia's famous Act for Establishing Religious Freedom of 1786. Drafted by Thomas Jefferson, the Act incorporates both free exercise and establishment principles:

> *[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever*, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

VA. CODE ANN. § 57-1 (emphasis added). The Virginia Assembly considered these freedoms to be the "natural rights of mankind." *Id.*

The debates leading to the Virginia Act arose from the prospect that general tax money might be used to pay members of the clergy for religious instruction. James Madison's famous "Memorial And Remonstrance Against Religious Assessments" was written in 1785 as a challenge to a "Bill establishing a provision for teachers of the Christian Religion." *See generally Everson*, 330 U.S. at 11-12 and Appendices thereto; Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 896-99 (1986). Madison's objection to using governmental tax power to support religious instruction was so well received that the original bill was discarded in favor of the Act Establishing Religious Liberty. *Id.* at 897. The Act was specific in its prohibition on tax-supported "ministry," a term that necessarily implies the services of clergy. In its preamble, the Virginia Act took special care to note its objection to paying clergy for religious instruction.

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that *teacher* of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the *ministry* those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the *instruction* of mankind.

VA. CODE ANN. § 57-1 (emphasis added).

A similar debate occurred in Maryland with a similar result. Laycock, 27 WM. & MARY L. REV. at 899. "The votes in Virginia and Maryland show that whenever a choice between nonpreferential aid [to religion] and no aid was squarely posed, Americans in the 1780's voted for no aid." *Id.* "[T]ax support for clerics engaged in education" was one of the primary church-state questions under consideration at the time of the founding. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 853 (1986). Against this backdrop of high-profile political battles over public funding for religious instruction, the framers surely did not intend for the federal Free Exercise Clause to mandate this controversial action that prominent states had recently chosen to avoid because it encroached on religious liberty.

The Virginia Act was echoed in many state constitutions as the nation grew. Wash. Const. art. I, § 11 was modeled on similar clauses in the constitutions of California (1879), Missouri (1875), Oregon (1857), and Indiana (1851). Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 25 (2002). Regarding clergy training specifically, ten states adopted even more explicit constitutional language that bars use of state or local funds for the support of any "seminary" or "theological or religious seminary."[2] *See generally*, Frank

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[2] Colo. Const. art. IX, § 7; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; Mon. Const. art. X, § 6; Pa. Const. art. III, § 29; Tex. Const. art. I, § 7; Wis. Const. art. I, § 18; Wyo. Const. art. VII, § 8.

R. Kemerer, *State Constitutions And School Vouchers*, 120 EDUC. L. REP. 1 (1997).

The reluctance of some jurisdictions to make payments for religious instruction is heightened in the context of clergy training. As a spiritual leader, educator, interpreter, and public spokesperson, a member of the clergy is "a person at the heart of any religious organization." *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). "[P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). The relationship between a church and its minister is "of prime ecclesiastical concern," *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982), and "the most spiritually intimate grounds of a religious community's existence," *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000). Because the spiritual and theological preparation of new clergy has such crucial significance to a religion, state-compelled financial support for clergy training raises especially serious free exercise questions for those taxpayers of differing religious beliefs who prefer not to subsidize core religious activity of others.

Federal law acknowledges the unique religious function of the clergy by recognizing, for example, a ministerial exception to employment discrimination laws where no government funding is involved, *e.g., Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); *Bryce v. Episcopal Church*, 289 F.3d 648, 656 (10th Cir. 2002), and the church autonomy doctrine that prevents civil courts from reviewing church decisions over ordination, assignment, or defrocking of clergy, *Serbian E. Orthodox*

Diocese for U.S. v. Milivojevich, 426 U.S. 696 (1976). It is fully consistent with these doctrines for Washington to decide that "[i]t is not the role of the State to pay for the religious education of future ministers," *Witters I*, 689 p. 2d at 56, and that "our state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters III*, 771 p. 2d at 1120.

This lengthy and continuing history wherein a sizable number of American jurisdictions limit their education funding to the secular arena strongly suggests that Washington's laws are permitted by the Religion Clauses. Other than the Ninth Circuit decision in this case, *amici* are unaware of any court ever ruling that a state's choice not to subsidize clergy training offended the Free Exercise Clause.

B. Washington May Ensure That Its Scholarships Do Not Have A Disparate Impact on Different Religions

In practice, a Promise Scholarship without an exception for clergy training would inevitably result in unequal funding for aspiring clergy of different religions. This is because the Promise Scholarship provides tuition subsidies only for persons attending accredited undergraduate colleges or universities in Washington, but only a handful of denominations train their clergy within an accredited undergraduate setting. Buddhist monks train at monasteries, not colleges or universities. Some Jewish colleges offer theological programs at the undergraduate level, but none in Washington state. Even among Protestant denominations, only a few train clergy at the undergraduate level, while the vast majority – including Baptists, Methodists, and Episcopalians – conduct their ministerial training at the graduate level. Of those few Protestant denominations that train clergy at an undergraduate level in Washington, some

do so at non-accredited colleges – such as the Inland Empire School of the Bible attended by Mr. Witters.

Surely, Washington may structure its Promise Scholarship to avoid the anomalous result of funding clergy training for Mr. Davey, but not for Mr. Witters and his many counterparts in other religions. It would be a pyrrhic victory for religious liberty if the Free Exercise Clause were read to bar Washington's effort to ensure that its scholarship program does not have the result in practice of subsidizing some religions but not others. *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a law that forbade animal sacrifice practiced by a single religious sect); *Larson v. Valente*, 456 U.S. 228 (1982) (laws that distinguish among religions are inimical to the Religion Clauses); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating conviction under ordinance that would penalize Jehovah's Witness sermon in a park but not religious services of others).

States wishing to provide state-funded scholarships thus face two basic alternatives. Under *Witters II*, they can offer scholarships that extend to clergy training if they choose to do so. As the present case demonstrates, however, this will typically result in very different benefits for different religions and, in may instances, will also violate the relevant state constitutional provisions. Alternatively, states can make the decision that Washington has made here and avoid funding clergy training altogether, even though this arguably results in unequal treatment between religious instruction and secular instruction. The play in the joints doctrine saves states from being damned if they do and damned if they don't. *Walz*, 397 U.S. at 674 ("Either course, taxation of churches or exemption, occasions some degree of involvement with religion.")

C. This Case Involves No Prohibition on Religious Exercise and No Discrimination on the Basis of Religion

Washington's scholarship program does not violate the Free Exercise Clause under any of this Court's settled tests. The most frequently used formulation asks whether the challenged law coerces believers to take action that violates their religion or to refrain from action commanded by their religion. *Lyng*, 485 U.S. at 451. Neither form of coercion is present here. The lack of a Promise Scholarship does not coerce Davey to perform forbidden acts or forego religious training. Furthermore, the Promise Scholarship does not discriminate on the basis of the recipient's religion. Any qualifying student, regardless of religion, may apply a Promise Scholarship to secular fields of study and no student, regardless of religion, may apply one to a degree in theology of any sect. Even the Ninth Circuit majority acknowledged that the ordinary Free Exercise tests favored the state, because the law in question "neither prohibits religious conduct nor does its application turn on the student's religious motivation." 299 F.3d at 753.

Comparing the facts of the present case to the facts of other relevant Free Exercise cases reinforces this conclusion. At one end of the continuum of laws that impact religious exercise are those that impose a criminal penalty on a belief or on the performance of a sacrament. The best example is the religiously-motivated ban on animal sacrifice in *Lukumi*, 508 U.S. at 523. Such laws are unconstitutional, particularly when they target the practices of particular religions. *But see Employment Div. v. Smith*, 494 U.S. 872 (1990) (state may prohibit all use of peyote, including sacramental use). A less invasive burden occurs when a state makes it legally impossible for a believer to exercise certain rights. The archetypal case is *McDaniel*, 435 U.S. at 621, where the

plaintiff had a state constitutional right to seek public office, but as a matter of law he could not exercise that right without first forfeiting his right to be a minister. This sort of law is usually unconstitutional. *But see Bowen v. Roy*, 476 U.S. 693 (1986) (statutory entitlement to poverty benefits may be conditioned on religiously-prohibited disclosure of social security numbers).

In a third type of case, a state law does not condition the exercise of religion on the complete relinquishment of another right, but instead makes religious exercise more expensive than it might otherwise have been. These laws have been upheld. For example, the state in *Braunfeld*, 366 U.S. 599, refused to grant an exemption to Sunday closing laws to Orthodox Jewish merchants whose faith required them also to close their stores on Saturdays. The Court found no Free Exercise violation from the mere fact that a state law "operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605. Religious devotion is sometimes expensive, a fact known to anyone who eats kosher meat, makes the pilgrimage to Mecca, or tithes to a church.

The present case lies on the constitutionally acceptable end of this continuum. Davey faces no threat of criminal prosecution, as did the plaintiffs in *Lukumi* or *Employment Div.* He suffers no legal disability, as did the plaintiffs in *McDaniel* and *Bowen*. To be sure, he will incur expenses that might have been ameliorated by a change in state law but that fact, standing alone, is not a violation of the Free Exercise Clause under *Braunfeld*. In short, Davey faces the common reality that exercising some rights is more expensive than exercising others. Without more, this does not violate the Free Exercise Clause.

III. A State Does Not Engage in Viewpoint Discrimination When It Enacts a Neutral, Non-Sectarian Prohibition Against Funding Any Form of Clergy Training In a State Scholarship Program

Although it decided the case on Free Exercise grounds, the Ninth Circuit majority relied heavily on the viewpoint neutrality doctrine developed under the Free Speech Clause. The majority initially held that the rules governing the Promise Scholarship "lacked neutrality" because they "refer on their face to religion," 299 F.3d at 753. The majority then found viewpoint discrimination in the decision not to fund theology degrees, because it "necessarily communicates disfavor, and discriminates in distributing the subsidy in such a way as to suppress a religious point of view." *Id.* at 756.

Because the aversion to viewpoint discrimination under the Free Speech Clause is justifiably strong, the accusation of viewpoint bias is a powerful rhetorical weapon. But the viewpoint label cannot fairly be attached to the Promise Scholarship, which as discussed above is structured to be scrupulously even-handed among religious viewpoints. The secular fields of study subsidized by Washington are different in kind, not merely in viewpoint, from clergy training. As applied to Davey, the Promise Scholarship program has not distinguished between viewpoints on an otherwise acceptable subject matter, but between distinct subject matters. This is in part because the First Amendment recognizes a constitutionally important difference between teaching about religion and practicing religion.

The Ninth Circuit's first assertion – that a law is necessarily viewpoint-based if it "refers to" religion – cannot withstand scrutiny. "[T]his Court has never required . . . that legislative categories make no explicit reference to religion." *Texas Monthly, Inc. v. Bullock*, 489 US 1, 10 (1989). A

legislature may unquestionably refer to religion in the course of a statute that guarantees religious independence. The Free Exercise and Establishment Clauses themselves refer to religion, so if taking note of religion is always viewpoint discrimination, then these Clauses are in irreconcilable conflict with the Free Speech Clause. This, of course, is not the case.

The more serious viewpoint argument derives from the Ninth Circuit's assertion that public universities in Washington teach "theology courses ... from an historical and scholarly point of view," 299 F.3d at 751, and that the state denies funding only for degrees in "theology taught from a religious perspective," *id.* at 760. The Ninth Circuit's formulation improperly conflates two distinct fields of study under the single term "theology." Consistent with the definition of "religious instruction" in Wash. Const. art. I, § 11, the term "theology" as used in WASH. REV. CODE § 28B.10.814 and as applied to Davey's major in Pastoral Ministries describes the devotional and worshipful study of God. It does not encompass secular, non-devotional courses that teach about religious beliefs and practices. As a factual matter, the record shows that public universities in Washington have no theology departments. Instead, the University of Washington has a Comparative Religion department within the Jackson School of International Studies, and it also offers classes about various world religions in the departments of Near East Studies and Philosophy. ER Tab 21 at 3-12. Degrees in these areas of study are not theology degrees within the meaning of Wash. Rev. Code § 28B.10.814, and the Ninth Circuit erred in describing them as such.

The distinction between theology and the study of religion is not mere semantics; to the contrary, it has long been reflected in constitutional rulings of this Court. In

striking down devotional readings of Bible verses and the Lord's Prayer in public schools, this Court noted:

> it might well be said that one's education is not complete without a study of *comparative religion or the history of religion* and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (emphasis added). Reflecting that distinction, this Court usually uses the term "theology" to mean devotional study, just as Washington does. For example, Justice O'Connor recognized that use of publicly-purchased equipment in the "theology department" of a Catholic school would constitute use for religious instruction. *Mitchell v. Helms*, 530 U.S. 793, 865 (2000) (O'Connor, J., concurring). "Theology" had the same meaning in a case *Mitchell* overruled, *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) (sectarian college "required attendance at classes in theology or at religious services").

The Washington Supreme Court likewise relied on this distinction when it held that a publicly-financed Bible as Literature course at a state university was not "religious instruction," because it was not "instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce

faith and belief in the student." *Calvary Bible*, 436 P. 2d at 193. *See also Rosenberger*, 515 U.S. at 826 (it is "an important consideration in this case" that Wide Awake was not a "religious organization," defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.") For his part, Davey certainly believes that his classroom experience at Northwest College constituted intrinsically religious activity, or else he would not claim that the lack of a state subsidy violated his right to free exercise of religion.

Once the confusion of terminology is resolved, it becomes evident that the Ninth Circuit misapplied this Court's repeated statements that "[s]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News* 533 U.S. at 112. *Accord Rosenberger*, 515 U.S. 819; *Lamb's Chapel* 508 U.S. 385. This rule does not resolve the present case. In each of the limited public forum cases it was possible to identify a subject matter that the plaintiff wished to address from a religious viewpoint. For example, the films in *Lamb's Chapel* discussed child-rearing from a religious perspective. By contrast, a degree in theology is not a discussion of a non-religious subject from a particular viewpoint. While theology degree programs of different denominations undoubtedly offer varying viewpoints about the nature of God, taken together they form the overall subject matter of theology.

Rosenberger noted how the religious-perspective-on-a-secular-subject formulation has meaning only in limited circumstances.

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history.

515 U.S. at 831. To be sure, this Court found that the particular exclusions involved in *Rosenberger*, *Lamb's Chapel*, and *Good News* classified on the basis of viewpoint, but this is not necessarily the case every time the topic of religion receives separate treatment. Lower courts have recognized that differential treatment of religion may sometimes be a distinction of subject matter and sometimes a distinction of viewpoint, depending on context. "Religion may be either a perspective…or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint." *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1267 n.6 (E.D. Wis. 2000) (citation omitted). The difference between a subject matter distinction and a viewpoint distinction depends on the facts. To draw a non-religious analogy, a law barring all Democrats from a ballot could be a forbidden viewpoint distinction in a general election, but an acceptable subject matter distinction during a Republican primary. The notion that "excluding religion as a subject or category from a forum always constitutes viewpoint discrimination … mischaracterizes the holding in *Rosenberger*." *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 969 (9th Cir. 1999).

The Ninth Circuit's misapplication of the viewpoint doctrine does not further the doctrine's purposes. As explained in *Rosenberger*, viewpoint discrimination is "an egregious form of content discrimination," 515 U.S. at 829, because it skews the marketplace of ideas in favor of the government's preferred position. By contrast, "viewpoint-

neutral restrictions directed against all speech relating to an entire subject do not have the same sort of skewing effect on 'the thinking process of the community' as restrictions directed specifically against speech taking a particular side in an ongoing debate." Geoffrey R. Stone, *Restrictions of Speech Because of Its Content*, 46 U. CHI. L. REV. 81, 108 (1978). This critical distinction was overlooked by the Ninth Circuit when it held that declining to fund clergy training "communicates disfavor" or constitutes "state disapproval of the religious pursuits" of aspiring clergy. 299 F.3d at 756. Just the opposite is true. Properly understood, Washington's policy is motivated by and furthers an interest in neutrality among religions and the promotion of religious liberty for all taxpayers. Indeed, Washington's constitutional prohibition on state funding for religious instruction is found directly adjacent to clauses ensuring "absolute freedom of conscience in all matters of religious sentiment, belief and worship," and guaranteeing that "no one shall be molested or disturbed in person or property on account of religion." Wash. Const. art. I, § 11. The framers of the Washington Constitution had no hostility to religious viewpoints. Robert F. Utter and Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L. Q. 451, 477 (1988). Separating the secular from the religious in this context does not reflect animus toward religion, but scrupulous respect for it.

This respect is further reflected by the fact that Washington provides greater protection to free exercise than the federal Constitution does when generally applicable laws are alleged to have burdensome impact on religious activity. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185-189 (1992) (state constitution does not follow *Employment Div.*). *See also City Chapel Evangelical Free Inc. v. City of S. Bend*, 744 N.E.2d 443 (Ind. 2001) (same);

Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992) (same). The combination of strong state Establishment Clauses with strong state Free Exercise Clauses indicates that these states do not harbor hostility against religion or a desire to suppress religious ideas. Affirming the states' ability to grant their citizens greater religious liberty under state Establishment Clauses would also affirm the states' ability to pursue greater religious liberty under state Free Exercise Clauses.

Amici of course agree with the principle, consistently repeated by this Court, that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830. *See also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (in making optional grants to artists, government may not rely on "considerations that, in practice, would effectively preclude or punish the expression of particular views"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (government may not "discriminate invidiously in its subsidies in such a way as to 'aim [] at the suppression of dangerous ideas'," quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). If a state made a formal decision to subsidize clergy training for Protestants but not for Catholics, the viewpoint bias would not vanish simply because it was expressed as the absence of a subsidy. For the reasons described above, however, there is no viewpoint discrimination in this case. The cases examining viewpoint discrimination in funding are therefore inapplicable.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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